

# TRANSCRIPT OF PROCEEDINGS

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

**DOCKET FILE COPY ORIGINAL**

In the Matter of:

David L. Titus

EB Docket No. 07-13

APR 10 2008  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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UNITED STATES OF AMERICA  
FEDERAL COMMUNICATIONS COMMISSION

+ + + + +

PRE-HEARING CONFERENCE

IN THE MATTER OF:	EB Docket No. 07-13
DAVID L. TITUS,	FRN No. 0002074797
Amateur Radio Operation and	File No.
License of Amateur Radio	EB-06-IH-5048
Station KB7ILD	

Thursday,  
April 10, 2008  
Federal Communications  
Commission  
Room TW A-363  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C.

The above-entitled matter came on  
for pre-trial conference, pursuant to  
notice, at 9:00 a.m.

BEFORE:

RICHARD L. SIPPEL  
Chief Administrative Law Judge

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## APPEARANCES:

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1 P-R-O-C-E-E-D-I-N-G-S

2 8:31 a.m.

3 JUDGE SIPPEL: This is a pre-  
4 hearing conference that was called by my  
5 order, FCC-08-M-23, and have you all given  
6 your notices to the court reporter?

7 Great, you have everybody?

8 Mr. Schonman, Mr. Knowles-Kellett,  
9 and Mr. Lyon, good morning.

10 MR. LYON: Good morning.

11 JUDGE SIPPEL: I've tried to do  
12 the best I could to indicate what the issues  
13 for discussion would be, and I've indicated  
14 that in the order.

15 Now, I think -- I'm not sure -- I  
16 gather that -- well, let me see if I can hear  
17 from the Bureau first of what you anticipate  
18 occurring this morning.

19 MR. SCHONMAN: Well, Your Honor,  
20 what we had anticipated discussing this  
21 morning may change somewhat. There has been  
22 a development, which I've already shared with

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1 Mr. Lyon, and I will certainly share with you.

2 We have been, that is, the Bureau  
3 has been trying to communicate with our main  
4 witness, Detective Shilling, over the past few  
5 days, in order to refine his testimony and  
6 remove any objections that Mr. Lyon may have.

7 And, we sent Detective Shilling e-  
8 mails and left several voice mail messages  
9 throughout the week.

10 This morning when Mr. Knowles-  
11 Kellet and I came into the office, we both  
12 found on our computers an e-mail from  
13 Detective Shilling from close to midnight last  
14 night, that would be close to midnight  
15 Wednesday night. And, Detective Shilling  
16 explained why he had not been able to get back  
17 in touch with us. It turns out that he has  
18 been in the hospital. They've been running  
19 tests, and it turns out that he may very well  
20 need gall bladder surgery, which would be  
21 relatively soon.

22 He explains in the e-mail to us

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1       that he will, hopefully, learn, although he's  
2       not sure, hopefully, learn later today,  
3       perhaps, tomorrow, whether he still needs  
4       surgery and what his condition will allow him  
5       to do, whether it's travel, testify, whether  
6       he'll be in a hospital room having surgery or  
7       not.

8               So, as of this moment things are  
9       pretty much up in the air. We don't know  
10      about his availability, because of this turn  
11      of events beyond his control and ours.

12             JUDGE SIPPEL: Well, what would  
13      you propose doing?

14             MR. SCHONMAN: Well, there are, I  
15      think, basically, two avenues we could pursue.

16             Number one, to temporarily delay  
17      the hearing, and we will certainly advise the  
18      court and Mr. Lyon as soon as we hear  
19      anything, as to whether he needs surgery. If  
20      he needs surgery, I would doubt we can have  
21      the hearing next week. If he doesn't need  
22      surgery, I don't know what condition he'll be

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1 in to participate in the trial next week.

2 So, one avenue is to temporarily  
3 delay the hearing, for some as yet unspecified  
4 number of weeks.

5 The other alternative is, if there  
6 were some way that the Bureau could refine his  
7 direct testimony, and if Mr. Lyon agreed to  
8 allow that direct testimony to be entered into  
9 the record, and agree further not to cross  
10 examine Mr. -- Detective Shilling, then it  
11 wouldn't be necessary beyond getting his  
12 direct testimony into the record for him to  
13 participate in the hearing.

14 JUDGE SIPPEL: By way of recast  
15 written testimony is the way he would  
16 participate, is that what you are saying?

17 MR. SCHONMAN: Yes. The second  
18 avenue would be to recast his testimony in a  
19 manner that Mr. Lyon would not find  
20 objectionable, and then also to have Mr. Lyon  
21 agree not to notice Detective Shilling for  
22 cross examination. That way his direct

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1 testimony comes in unopposed, and,  
2 essentially, Detective Shilling's  
3 participation in the hearing is on paper and  
4 finished.

5 That's the second avenue.

6 JUDGE SIPPEL: Have you discussed  
7 this at all?

8 MR. SCHONMAN: With Mr. Lyon?

9 JUDGE SIPPEL: Yes.

10 MR. SCHONMAN: Only to raise the  
11 option, but beyond raising the option, no, we  
12 haven't discussed it.

13 I mean, we literally informed Mr.  
14 Lyon probably 90 seconds before you walked  
15 into the courtroom this morning.

16 JUDGE SIPPEL: Oh.

17 MR. SCHONMAN: So --

18 JUDGE SIPPEL: Oh dear.

19 MR. SCHONMAN: -- this has all  
20 happened this morning.

21 JUDGE SIPPEL: Okay. Well, let me  
22 hear from Mr. Lyon.

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1 MR. LYON: Your Honor, there's,  
2 obviously, some slight surprise to me, and I  
3 haven't had more than about 30 seconds right  
4 before you walked in to discuss with my  
5 client.

6 JUDGE SIPPEL: Let me just say  
7 this. Would you want to recess for half an  
8 hour or an hour, and then I can come back?  
9 Would that help you at all?

10 MR. LYON: Perhaps, about ten or  
11 15 minutes might be fine, but there are a  
12 couple of ideas that I had.

13 JUDGE SIPPEL: Okay.

14 MR. LYON: Basically, if there  
15 would be a circumstance where I could agree to  
16 bring Shilling's testimony in unopposed, it  
17 would probably have to be substantially more  
18 truncated than what the Bureau and I have been  
19 discussing so far.

20 The other potentiality is that if  
21 it would come in along with the rebuttal  
22 exhibits that I have proposed, including the

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1 testimony of Dr. Epperson, who designed the  
2 Minnesota test that Shilling, principally,  
3 relied upon, and who indicates now that it's  
4 superseded and not recommended to be used.

5 And, at that point, I could make a  
6 motion orally for summary decision on the  
7 issues. If you were to deny that motion, I'd  
8 have to insist on my right to cross examine  
9 Detective Shilling.

10 I raised that matter with the  
11 Bureau, perhaps, a minute before you walked  
12 in, and I don't think they've had a chance to  
13 evaluate or think about it at this point.

14 But, those, to me, seem to be the  
15 two alternatives we could go with at this  
16 point.

17 JUDGE SIPPEL: Well, all right,  
18 all right. I think that -- I brought all the  
19 necessary documents down for this conference,  
20 and I forgot my calendar, the most important  
21 thing right now.

22 Let me -- again, this is -- I'm

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1 hearing this even 90 seconds later than you  
2 are, but my thinking would be this. I did  
3 look at the rebuttal evidence, and it would  
4 seem to me, in light of this development, and  
5 my instincts, perhaps, a little bit of my  
6 experience, tell me that no matter what you do  
7 to accommodate Detective Shilling he's not  
8 going to be a happy camper, because, you know,  
9 if you've got a serious discomfort, and we  
10 have to sit around and wait until his serious  
11 discomfort, hopefully, goes away, there's  
12 always the other -- God, we don't want to  
13 think about that.

14 I guess what I'm trying to get at  
15 is that, you know, I heard the term -- the  
16 concept of summary decision, and that might  
17 just work if the Bureau is willing to waive  
18 cross examination.

19 MR. SCHONMAN: Can we go off the  
20 record for a moment?

21 JUDGE SIPPEL: Yes, I don't have  
22 any problem with that. Sure.

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1 Let's go off the record.

2 (Whereupon, at 9:08 a.m., a  
3 discussion off the record until 9:14 a.m.)

4 JUDGE SIPPEL: I just want to  
5 reflect generally, in an off-the-record  
6 discussion there was a candid effort to try  
7 and lay out some possibilities of procedure  
8 off the record, and I think it's at the point  
9 now where we can talk more specifically on the  
10 record.

11 Now, go ahead, Mr. Schonman,  
12 continue with your thoughts. Go ahead.

13 MR. SCHONMAN: My thought is that  
14 there has been a reference to the possibility  
15 of making a motion for summary decision at  
16 some point in this case, and I have expressed  
17 to Your Honor off the record, and I'll do so  
18 now on the record, that the Bureau does not  
19 believe that this case is an appropriate  
20 candidate for summary decision, that there are  
21 important issues, given the nature of the  
22 offense, and all the other evidence that may

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1       come in onto the record, that a summary  
2       decision will not be appropriate,  
3       notwithstanding the fact that discussion now  
4       -- in recognition of the fact that discussion  
5       now about summary decision is quite premature.

6               I think --

7               JUDGE SIPPEL:     Well, the only  
8       reason that that came up is because of the  
9       unusual situation that happened this morning.

10              MR. SCHONMAN:   Right.

11              JUDGE SIPPEL:   I mean, you know,  
12       that wasn't even going to be -- that was no  
13       where on anybody's agenda this morning for  
14       summary decision.

15              MR. SCHONMAN:   Of course.

16              JUDGE SIPPEL:   We were just  
17       exploring, you know, the outer worlds of what  
18       might be possible.

19              All right, I hear you, you are not  
20       going to go -- the Bureau would not -- does  
21       not believe this case to be appropriate for  
22       summary decision.

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1 MR. SCHONMAN: In order for this  
2 case to proceed on course as scheduled next  
3 week, I think there are two things that would  
4 have to happen.

5 Number one, the Bureau has to firm  
6 up its direct testimony of Detective Shilling.  
7 And, quite frankly, we don't know under the  
8 circumstances whether Detective Shilling is in  
9 a position to review his testimony and make  
10 whatever edits are appropriate. Okay? We  
11 don't know whether we can communicate with him  
12 before next week. All right?

13 That's number one.

14 Assuming we were able to firm up  
15 his direct testimony in a manner that Mr.  
16 Titus' counsel would find acceptable, the  
17 second -- the second matter that has to be  
18 cleared up is that Mr. Lyon would have to  
19 agree to waive his right to cross examine  
20 Detective Shilling.

21 If we don't have both of those two  
22 things, that is, direct testimony and a waiver

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1 of the right to cross, then I don't think that  
2 we can have a hearing next week, under the  
3 circumstances.

4 JUDGE SIPPEL: Well, Mr. -- you  
5 know, I don't have any problem with deferring  
6 it. Even if nothing else happens, just the  
7 fact that your key -- I don't know if it's  
8 your key witness, but a very important  
9 witness, who is sick and disabled, to what  
10 extent we don't know, to put him -- to put you  
11 to the burden of having him fly up here next  
12 week, to me, would be irresponsible.

13 So, I'm putting him on the shelf  
14 in a sense. It's just a question of how --  
15 what do we want to do in the meantime.

16 Now, there would -- the short  
17 approach would be something in the nature of  
18 maybe a partial summary decision, something --  
19 in other words, try and put this case as a  
20 paper case as much as possible.

21 My recognition, and I think  
22 everybody agrees, that Mr. Titus, in one, way,

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1 shape or form, has to be subject to cross  
2 examination, whether you do it by, you know --  
3 well, we've indicated what we could do,  
4 teleconference him from the West Coast to  
5 here.

6 Now, that would be, let's say  
7 that's the lowest common denominator, and then  
8 you move out from there.

9 Now, all you have to do is just  
10 right now just indefinitely postpone the  
11 hearing until we get a report on his  
12 condition.

13 MR. SCHONMAN: Well, that may be  
14 the most --

15 JUDGE SIPPEL: And then reset the  
16 dates.

17 MR. SCHONMAN: -- that would be,  
18 perhaps, the most appropriate method of doing  
19 that.

20 JUDGE SIPPEL: And, you were going  
21 to recast his testimony anyway, isn't that  
22 right?

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1 MR. SCHONMAN: Yes, sir.

2 JUDGE SIPPEL: That's what you are  
3 doing.

4 MR. SCHONMAN: We are in the  
5 process of refining his testimony.

6 JUDGE SIPPEL: So, another reason  
7 why it's just impracticable, if not  
8 impossible, to have a hearing next week.

9 So, why don't we do this. Why  
10 don't we just temporarily postpone the  
11 hearing, and I'll set new dates when we find  
12 out what the condition is, and you just give  
13 me a status report, let's say, in ten days.

14 MR. SCHONMAN: We will do that.  
15 Well, as soon as we hear on Detective  
16 Shilling's condition.

17 JUDGE SIPPEL: Well, of course, or  
18 before that, yes, but I'm saying --

19 MR. SCHONMAN: We'll certainly  
20 give you a status report and share with the  
21 court and Mr. Lyon what we know when we find  
22 out.

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1 JUDGE SIPPEL: Right. I just want  
2 to know, at least by ten days I want to know  
3 what's going on.

4 MR. SCHONMAN: Yes, sir. We will  
5 certainly do that.

6 JUDGE SIPPEL: My idea is that,  
7 what I'm hearing now today is that we will get  
8 his testimony recast, then we are going to do  
9 the same thing that we did before. We are  
10 going to have an admission session, we are  
11 going to either, you know, receive it quickly  
12 and quietly, or we are going to have some more  
13 debate over it, and at that point then we can  
14 get into what you want to do with rebuttal, if  
15 anything.

16 I'm not convinced that this case  
17 needs a rebuttal. I'm just simply trying to  
18 handle the situation as it was presented to me  
19 this morning, which was, you know, up in the  
20 air.

21 MR. SCHONMAN: I would share with  
22 you that Bureau counsel and Mr. Titus' counsel

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1 have had discussions about refining, I prefer  
2 to use the word refine Detective Shilling's  
3 testimony rather than recast it, we have had  
4 a number of discussions, and I would venture  
5 to say that we are relatively close to  
6 language that both sides would find  
7 acceptable. We just have to run it past  
8 Detective Shilling to make sure that it is all  
9 factually accurate and that it's acceptable to  
10 the witness.

11 JUDGE SIPPEL: Okay.

12 MR. SCHONMAN: We just have this  
13 sudden and very unexpected event which has  
14 happened.

15 JUDGE SIPPEL: Okay, well, that's  
16 -- I think that this is the best way to leave  
17 it then.

18 So, we'll be in recess pending my  
19 call, with a ten-day or earlier status report  
20 on the condition of Detective Shilling.

21 MR. SCHONMAN: Thank you, Your  
22 Honor.

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1 JUDGE SIPPEL: Okay? Thank you  
2 very much.

3 MR. LYON: Thank you.

4 JUDGE SIPPEL: We are off the  
5 record.

6 (Whereupon, the above-entitled  
7 matter was concluded at 9:20 a.m.)  
8  
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David L. Titus

Name of Hearing

EB DOCKET NO. 07-13

Docket No. (if applicable)




445 12<sup>th</sup> STREET, S.W., WASHINGTON, D.C.

Place of Hearing

April 10, 2008

Date of Hearing

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 9, inclusive, are the true, accurate and complete transcript prepared from the reporting by Kevin Connolly (Reporter's Name) in attendance at the above identified hearing, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription statement of Work and have verified the accuracy of the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing or conference.

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